SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

71-948

GEORGE F. GIPE, As Guardian for RONALD D. GIPE,
An Incompetent,
Petitioner,

v.

JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife;
VICTOR HEINS and JANE DOE HEINS, his wife;
FRANK C. RAMON and JANE DOE RAMON, his wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FRANK C. RAMON and JANE DOE RAMON, his wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Certiorari is respectfully sought to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 23, 1971 denying petitioner relief under the Civil Rights Act (42 USC 1983) for injuries inflicted by police while searching his home for evidence without a warrant, on the sole and only ground that failure to forcibly resist uniformed police officers as they crossed the threshold is a waiver of the protection of the Fourth Amendment.

OPINION BELOW

The opinion of the Court of Appeals has not been reported (Appendix A-1).

JURISDICTION

The opinion of the Court of Appeals was rendered on November 5, 1971. Petitioner timely filed a petition for rehearing, which was denied by order entered December 23, 1971 (Appendix at p. A-5).

The jurisdiction of the District Court is invoked under 42 USC 1983 and 28 USC 1343, and the jurisdiction of this court is invoked under 28 USC 1257 (3).

QUESTION PRESENTED FOR REVIEW

Does failure to forcibly resist uniformed police officers, as they enter a home without a warrant to search for evidence upon which to make an arrest for a misdemeanor, constitute a waiver of the protection of the Fourth Amendment against unreasonable search.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Civil Rights Act, 42 USC 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the constitution and laws, shall be liable to the party injured in any

action at law, suit in equity, or other proper proceedings for redress."

18 USC 3109:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Article 1, Section 7, Washington State Constitution:

"*Invasion of private affairs or home prohibited.* No person shall be disturbed in his private affairs, or his home invaded without authority of law."

Revised Code of Washington, Section 10.79.040:

"*Search without warrant unlawful.* It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling, house or place or residence without the authority of a search warrant issued upon a complaint as by law provided."

STATEMENT OF THE CASE

Petitioner brought this action in the United States District Court for the Western District of Washington, Northern Division, under the Civil Rights Act seeking damages in his capacity as General Guardian of his adult mentally incompetent son for injuries and damages received at the hands of police officers who invaded petitioner's home without a warrant in search for evidence to establish the commission of a misdemeanor.

Color of lawful authority required by the Civil Rights Act was the wearing of police uniform to gain entry into the home without a warrant to search for evidence upon which to make an arrest for a violation of a city ordinance

pursuant to the customs and usage of the Seattle Police.

The undisputed evidence is as follows: Respondents, uniformed police officers, were informed by petitioner's neighbor that a disturbance (consisting of noise only) was taking place in petitioner's home—a misdemeanor under a city ordinance. The informer could not identify the persons making the noise. Petitioner was not personally at home at the time. Respondents heard voices emanating from petitioner's home which they considered to be a disturbance within the meaning of the city ordinance. Respondents did not know, and could not ascertain, the identity of the person they considered committing the misdemeanor from outside petitioner's home. The police officers, recognizing it was necessary to enter the home to ferret out the identity of the person causing the disturbance, knocked on the door of petitioner's home seeking admission. The door was opened but no one invited the officers in by word or gesture. The officers still could not see who was making noise so they walked through the open door and on into the house.

This entry, gained by the display and recognition of the authority of police in uniform who were acting pursuant to the custom and usage of Seattle Police Department in ferreting out the violation of a city ordinance, established the "color" required under the Civil Rights Act and is the key issue in this case.

At the time the officers entered no one in the house knew, or had any way of knowing, whether the officers had a proper warrant authorizing them to enter and search the house. The officers testified that as they entered an adjoining room they saw petitioner's ward making the

noise that, in their opinion, constituted the misdemeanor the officers were investigating. Until that moment the officers did not have probable cause to believe petitioner's ward was committing the misdemeanor. At that same moment petitioner's ward asked the officers if they had a warrant. When the officers replied in the negative, petitioner's ward ordered them to leave. The officers refused to leave and petitioner's ward raised his voice in protest to the point where the officers considered that he was creating a disturbance and thus in violation of the misdemeanor ordinance they were investigating. The official written report filed by respondents immediately afterward stated petitioner's ward was arrested because he "refused to listen to officers."

When the officers and the ward reached the yard in front of petitioner's home, a guest came out of petitioner's home and attacked one of the officers. The other officer then strangled petitioner's ward until he was unconscious. The ward was never convicted of any crime arising out of the occurrence.

The trial court refused to submit any issues to the jury on the entry being in violation of the Fourth Amendment, or the statutes of the State of Washington prohibiting unlawful search, but instead instructed the jury that there were no issues of unlawful entry to search for evidence. The trial judge refused to submit a general verdict. The trial court submitted two special interrogatories limiting the jury's consideration to the questions of (1) a breach of peace in the presence of the officers, and (2) whether the officers used excessive force. Neither of these issues were tendered by the pleadings nor requested to be submitted by respondents or petitioner.

The jury found against the petitioner on those questions.

On appeal petitioner contended the District Court should have directed a verdict in petitioner's favor, or at least have submitted the issue of unlawful entry to the jury.

The Court of Appeals refused to grant petitioner a new trial, but affirmed the judgment for the reasons that (1) the officers used no force in entering the home and (2) they encountered no resistance. The Court of Appeals relied upon cases relieving an officer serving a warrant of the duty to give notice of his authority and purpose before breaking into a house, as required by 18 USC 3109, when he merely walks through an open door. This theory was never presented, or even suggested, in the District Court and was not mentioned or suggested in brief or argument by respondents. The theory, that failure to resist a uniformed officer as he enters the home is a waiver of the Constitutional privileges guaranteed by the Fourth Amendment, was injected *sua sponte* by the Court of Appeals for the Ninth Circuit.

REASONS FOR ALLOWANCE OF WRIT

1. For the first time in our history, a court has decreed that unless one uses force and violence to protect his Constitutional rights, he will be denied judicial relief for the violation of those rights, thus abandoning the sacred doctrine that the juridicary has the duty to guarantee our Constitutional rights. The decision of the Court of Appeals is in direct conflict with *United States v. Di Re*, 332 U.S. 581, 92 L.Ed. 210. The sole and only reason given by the Court of Appeals for denying petitioner's relief is summed up in the words of the opinion:

> "[The] officers used no *force* in entering the home. . . . The officers made no demand, nor did they use any *force*. They simply stepped inside the house through the open door and encountered no *resistance* whatsoever." (Emphasis supplied)

Unless the decision of the Circuit Court is promptly struck down, every uniformed officer in our land will be subjected to the threat of lawful forcible resistance every time he crosses a threshold. It is imperative that this court promptly dispel any suggestion that force must be used against uniformed officers to preserve one's Constitutional Rights.

2. The facts of this case relating to unlawful entry in search of evidence are indistinguishable from those of *Johnson v. United States*, 333 U.S. 10 (1948), 68 S.Ct. 367, 92 L.Ed. 436. In both cases the police officers received an informer's tip of a law violation by some unknown person or persons. In *Johnson* the violation was a felony, while in the case at hand the violation was a misdemeanor of the lowest order. In both cases the officers recognized they must gain entry into living quarters to identify the law violator. In *Johnson*, the officers smelled burning opium and knocked on the door and were admitted when they announced they were police officers. In the case at hand the officers heard loud noises and knocked on the door, and the door was opened by someone, who could obviously see that they were police officers by their uniforms. There was no word or gesture of any kind inviting the police officers to enter. The occupants of petitioner's home had no way of knowing whether the police officers were entering pursuant to a proper warrant and, therefore, no effort was made to stop them or resist their entry. Once inside the home, the police officers contend they found the evidence they were searching for, to wit: the identity of the person

committing the misdemeanor. In *Johnson*, the police officers did not know who was committing the felony until they entered the living quarters and found that Ann Johnson was the only person in the room. In both cases, the police did not have probable cause to make an arrest until they had completed their search for the identity of the person committing the crime after entry into the living quarters. Police officers may arrest for a felony on probable cause but not for a misdemeanor. Therefore, the officers here had even less excuse for entering the home to make an arrest. The *Johnson* opinion declared the entry of the police into the living quarters in violation of the Fourth Amendment, and the arrest which followed unlawful. The facts of the two cases cannot be distinguished, the Court of Appeals for the Ninth Circuit has decided a Federal question in direct conflict with the law as pronounced by this court.

Ironically, this case and *Johnson* have more in common than the facts. Both were tried in the same court room; involved the same police department; the same Court of Appeals condoned the unlawful conduct of the police. All that remains to complete the parallel is the reversal of the judgment of the Court of Appeals.

By refusing to follow the mandate of *Johnson*, the Court of Appeals has, in fact, invited this Court to reconsider and reverse *Johnson*. If this Court does not grant certiorari, the decision of the Court of Appeals, followed by the denial of certiorari, will amount to a *sub silento* reversal of *Johnson* and *Di Re*. If *Johnson* is bad law it should be reversed by this Court. If it is good law the Court of Appeals should be reversed. The two decisions cannot both stand as the law.

Petitioner respectfully prays this court issue the writ of certiorari.

Respectfully submitted,

PHILIP L. BURTON
Attorney for Petitioner

VAUGHN E. EVANS
Of Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD D. GIPE, by his Guardian, GEORGE F. GIPE, *Appellant*, v. JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife; VICTOR HEINS and JANE DOE HEINS, his wife; FRANK C. RAMON and JANE DOE RAMON, his wife, *Appellees.*	No. 26,022

[November 5, 1971]

Appeal from the United States District Court
Western District of Washington

Before: HAMLEY and KILKENNY, Circuit Judges, and GOODWIN, District Judge.*

KILKENNY, Circuit Judge:

Appellant prosecuted this action in district court under 42 U.S.C. § 1983 for an alleged violation of his civil rights. The case was tried to a jury and submitted on interrogatories. Based on the answers to the interrogatories, the court dismissed the action.

FACTS

For the purposes of this appeal, we can say that the facts are practically undisputed. In Seattle, Washington, on March 22, 1964, Seattle policemen Dempsey and Heins

*The Honorable Alfred T. Goodwin, United States District Judge for the District of Oregon, sitting by designation.

were on patrol in a prowler car. At approximately 2:30 A.M., they received a radio dispatch in connection with a complaint on a disturbance in the appellant's residence. When they arrived at the scene they heard "loud, profane and obscene language" coming from the Cipe house. Before entering the house, the officers interviewed two people in an automobile in front of the house and a next door neighbor, the source of the complaint. From them it was determined that the yelling and hollering had been emanating from appellant's home for some time. The officers then approached the front door of the home and knocked. At this time the loud noises inside the appellant's residence were continuing. Someone opened the door and immediately stepped behind it. The officers entered the home and stood for a moment and asked who was the owner of the house and suggested that they quiet down. Appellant, then in plain view, continued yelling and asked why the officers were there and who had complained. About this time, he demanded a search warrant. The officers again told him to quiet down or they would have to place him under arrest. There is ample evidence in the record to show that appellant and the other occupants of the house had generously imbibed of intoxicating liquor. When the appellant would not quiet down, the officers placed him under arrest, for a breach of the peace.[1] After Cipe was removed from the house, one Harris, a companion of appellant, jumped on one of the officers, beating him on the head with brass knuckles. Harris was subdued, but appellant continued to struggle. The officers had to "choke out" appellant before he would keep quiet.

1. Ordinance No. 16046 of the City of Seattle prohibits fighting, drunkenness, disorderly conduct, disturbing the peace, and other matters.

CONTENTIONS

We need consider only two of appellant's contentions: (1) that the trial court erred in failing to direct a verdict for appellant, and (2) that the trial court erred in not submitting to the jury the question of whether the officers had unlawfully entered the appellant's residence.

The following interrogatories were submitted to the jury and answered adversely to appellant's claims.

> "(1) Did Ronald Gipe commit a breach of the peace in the presence of Officers Hines [sic] and Dempsey?
>
> Yes
>
> (Yes or No)
>
> (2) Did Officers Hines [sic] and Dempsey use excessive force in making the arrest and/or transferring Ronald Gipe to the police station?
>
> No
>
> (Yes or No)

The undisputed evidence is that the officers used no force in entering the home. They knocked on the door, the door was opened and they peaceably stepped inside. In these circumstances, the entry was lawful. *United States v. Scharf*, 421 F.2d 1239 (9th Cir. 1970); *Reyes v. United States*, 417 F.2d 916 (9th Cir. 1969); *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965); *Dickey v. United States*, 332 F.2d 773 (9th Cir. 1964).

Johnson v. United States, 333 U.S. 10 (1948), upon which appellant relies, is not in point. In *Johnson*, the entry to the defendant's living quarters, which was the beginning of a search, was demanded by the officers under color of office. Here, the officers knocked on the door in

the customary manner and the door was opened. The officers made no demand, nor did they then use any force. They simply stepped inside the house through the open door and encountered no resistance whatsoever. After their entry, the appellant committed a breach of the peace in the officers' presence. *Johnson* recognizes the validity of an arrest under such circumstances. *Johnson*, *supra*, p. 15.

The overwhelming weight of the evidence supports the jury's findings that appellant committed a breach of the peace in the presence of the officers and that the officers did not use excessive force in making the arrest or in transferring him to the police station. Appellant was not entitled to a directed verdict, nor was he entitled to have submitted to the jury his contentions that the officers had unlawfully entered his residence.

In the light of the foregoing, we need not reach the appellant's contention on punitive damages.

The judgment of the lower court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

RONALD D. GIPE, by his Guardian, GEORGE F. GIPE, *Appellant*, v. JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife; VICTOR HEINS and JANE DOE HEINS, his wife; FRANK C. RAMON and JANE DOE RAMON, his wife, *Appellees.*	No. 26,022

Appeal from the United States District Court
Western District of Washington

ORDER

Before: HAMLEY, KILKENNY and GOODWIN*,
Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*The Honorable Alfred T. Goodwin, District Judge for the District of Oregon at time of argument, then sitting by designation.

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PETITION FOR REHEARING

ON

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FRANK C. RAMON and JANE DOE RAMON, his wife,
Respondents.

PETITION FOR REHEARING

ON

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Upon grounds of intervening circumstances of substantial and controlling effect (Opinion No. 70-26, *Goodling v. Wilson*, filed March 23, 1972), and upon substantial grounds available to petitioner although not previously presented, *Certiorari* is respectfully sought to review the judgment of the United States District Court for the Western District of Washington, Northern Division, as affirmed by the United States Court of Appeals for the Ninth Circuit. The action was brought under the Civil Rights Act (42 U.S.C. 1983) for injuries inflicted by Seattle police acting under a department policy that it is better to enter a home and make an arrest for using profane language in

public (a misdemeanor) upon the complaint of a neighbor than to wake up a magistrate to issue a warrant.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced at Appendix A-1.

The denial of rehearing of the opinion of the Court of Appeals is reproduced at Appendix A-5.

The opinion of the District Judge upon which the judgment is founded is reproduced at Appendix A-6.

The original petition for *Certiorari* was denied March 20, 1972. This petition for rehearing is filed within twenty-five days thereafter.

QUESTIONS PRESENTED FOR REVIEW

1. Does a police department policy of entering a home upon the oral complaint of a neighbor, to search for and arrest one suspected of committing the misdemeanor of shouting obscenities rather than "getting the complaining witness to go down in the middle of the night and get some magistrate out of bed and make a complaint and sign a complaint and have a warrant issued to go out and arrest somebody," violate the guarantees of the Fourth Amendment?

2. Does a City Ordinance which provides:

> "It shall be unlawful for any person to be guilty of fighting, drunkenness or of riotous or disorderly conduct, or for any conduct tending to disturb the public peace, or to use any profane or abusive language, or to engage in any act or practice whereby the peace or quiet of the city may be disturbed, or to use any obscene language or to be guilty of any indecent or

immoral act, practice or conduct tending to debauch the public morals."

violate the First and Fourteenth Amendments, when it is used and interpreted as authority to arrest for using profane and obscene (but not fighting) words to a police officer in protesting the entry into one's home without a warrant to search for evidence of a misdemeanor?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment IV to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1 of Amendment XIV to the Constitution of the United States:

§ 1. Citizenship rights not to be abridged by states

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Civil Rights Act, 42 U.S.C. 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceedings for redress."

Article 1, Section 7, Washington State Constitution:

"*Invasion of private affairs or home prohibited.* No person shall be disturbed in his private affairs, or his home invaded without authority of law."

Revised Code of Washington, Section 10.79.040:

"*Search without warrant unlawful.* It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling, house or place or residence without the authority of a search warrant issued upon a complaint as by law provided."

Ordinance of the City of Seattle No. 16046:

"It shall be unlawful for any person to be guilty of fighting, drunkenness or of riotous or disorderly conduct, or for any conduct tending to disturb the public peace, or to use any profane or abusive language, or to engage in any act or practice whereby the peace or quiet of the city may be disturbed, or to use any obscene language or to be guilty of any indecent or immoral act, practice or conduct tending to debauch the public morals."

CONCISE STATEMENT OF THE CASE

Two Seattle police officers, Dempsey and Heins, responded to a telephone complaint of a neighbor living

next door to petitioner's home, that a man (not the petitioner) had been shouting obscenities from the petitioner's front porch in the early morning hours. The police knocked on the front door of petitioner's home. When the door opened the police walked in without any invitation by gesture or word, and the person opening the door stepped aside in recognition of the color of authority presented by the uniforms of the police, and upon the assumption that the police had a warrant or other lawful authority to enter.

Petitioner was seated in an adjoining room. When the police came into his view he immediately asked for their authority to be in his home and if they had a warrant. These were the first words exchanged between the police officers and any occupants of petitioner's home. When the police acknowledged they did not have a warrant, petitioner asked them to leave, using what the police termed obscene language. The police acknowledged that the same language is used around the police station and by the officers themselves. Petitioner was arrested for using obscene language and forcibly removed from the interior of his home into the front yard where the officers strangled him until he was unconscious.

Petitioner was at the time, and still is, a mentally incompetent adult. The action was brought by his general guardian for the mental and physical damage suffered by petitioner and for punitive damages pursuant to 42 U.S.C. 1983. Petitioner's mental status substantially deteriorated by reason of the traumatic events related.

The trial judge refused to submit any issues to the jury relating to unlawful entry. Instead the learned District

Judge ruled as a matter of law (as set out in Appendix 6) that the police department policy as carried out by the officers was better than awakening a magistrate in the middle of the night to sign a warrant.

The neighbor (complaining witness) identified the person about whom he complained as a man different from petitioner. There was no evidence to the contrary.

The Court of Appeals for the Ninth Circuit, relying upon disputed evidence most favorable to the police, affirmed the trial judge's refusal to submit the issues of unlawful entry to the jury, but upon grounds wholly foreign and unrelated to the evidence or issues of this case.

Petitioner first sought *Certiorari* on the grounds that the new and novel theory of the Ninth Circuit that one must forcibly resist police as they enter the door to preserve one's constitutional rights was in violation of the Fourth Amendment. That reasoning was *sua sponte* on the part of the Court of Appeals, it not being argued orally or mentioned in briefs. *Certiorari* on that ground was denied March 20, 1972.

REASONS FOR ALLOWANCE OF WRIT

(1) The protection of the Fourth Amendment is limited to the hours of 9 a.m. to 5 p.m.

That is the practical effect of the District Judge's ruling (Appendix A-6) and the affirmance by the Court of Appeals for the Ninth Circuit. Their decisions are in conflict with the applicable decisions of this court.

Every day in every city police officers are tempted to enter homes without warrants to search for evidence or individuals. They are restrained only by the Fourth Amendment and the judicial branch of our government. The ruling of the District Judge in this case, and the affirmance of that ruling by the Circuit Court of Appeals, is in violent conflict with *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877; *Johnson v. United States*, 333 U.S. 10 (1948), 68 S.Ct. 367, 92 L.Ed. 436, and later opinions relying upon these decisions.

This ground was available but not presented in the original petition for *certiorari*.

(1) Since the original petition for *certiorari* was submitted, the decision of *Gooding v. Wilson*, *supra*, was made on March 23, 1972. The city ordinance upon which the police officers here based their arrest is even more repugnant to the First Amendment of the Constitution than the Georgia Statute considered in *Gooding*. Here the officers arrested petitioner under the city ordinance for using obscene language to them in his protest against their being in his home without a warrant. Up until petitioner so addressed the officers they had no intention of arresting petitioner and indeed had no excuse to arrest

him. The ordinance was relied upon for a valid arrest and the District Court so ruled it was a valid arrest.

The statute is overly broad in that it authorizes an arrest for use of profane language and for use of obscene language, without any limits. Such ordinances and state codes are declared to be in violation of the First and Fourteenth Amendments by *Gooding* and cases cited therein.

Petitioner respectfully prays this court issue the Writ of Certiorari.

Respectfully submitted,

VAUGHN E. EVANS
Attorney for Petitioner

PHILIP L. BURTON
Of Counsel for Petitioner

Certificate of Counsel Pursuant to Rule 58.

The undersigned counsel for petitioner does hereby certify that this petition for rehearing is presented in good faith and is not for delay and further certifies that this petition is restricted to intervening circumstances of substantial and controlling effect and to substantial grounds available to petitioner not previously presented.

VAUGHN E. EVANS
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD D. GIPE, by his Guardian, GEORGE F. GIPE,

Appellant,

v.

JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife; VICTOR HEINS and JANE DOE HEINS, his wife; FRANK C. RAMON and JANE DOE RAMON, his wife,

Appellees.

No. 26,022

[November 5, 1971]

Appeal from the United States District Court
Western District of Washington

Before: HAMLEY and KILKENNY, Circuit Judges, and GOODWIN, District Judge.*

KILKENNY, Circuit Judge:

Appellant prosecuted this action in district court under 42 U.S.C. § 1983 for an alleged violation of his civil rights. The case was tried to a jury and submitted on interrogatories. Based on the answers to the interrogatories, the court dismissed the action.

FACTS

For the purposes of this appeal, we can say that the facts are practically undisputed. In Seattle, Washington, on

*The Honorable Alfred T. Goodwin, United States District Judge for the District of Oregon, sitting by designation.

March 22, 1964, Seattle policemen Dempsey and Heins were on patrol in a prowler car. At approximately 2:30 A.M., they received a radio dispatch in connection with a complaint on a disturbance in the appellants' residence. When they arrived at the scene they heard "loud, profane and obscene language" coming from the Gipe house. Before entering the house, the officers interviewed two people in an automobile in front of the house and a next door neighbor, the source of the complaint. From them it was determined that the yelling and hollering had been emanating from appellant's home for some time. The officers then approached the front door of the home and knocked. At this time the loud noises inside the appellant's residence were continuing. Someone opened the door and immediately stepped behind it. The officers entered the home and stood for a moment and asked who was the owner of the house and suggested that they quiet down. Appellant, then in plain view, continued yelling and asked why the officers were there and who had complained. About this time, he demanded a search warrant. The officers again told him to quiet down or they would have to place him under arrest. There is ample evidence in the record to show that appellant and the other occupants of the house had generously imbibed of intoxicating liquor. When the appellant would not quiet down, the officers placed him under arrest for a breach of the peace.[1] After Gipe was removed from the house, one Harris, a companion of appellant, jumped on one of the officers, beating him on the head with brass knuckles. Harris was subdued, but appellant continued to struggle. The officers had to "choke out" appellant before he would keep quiet.

1. Ordinance No. 16046 of the City of Seattle prohibits fighting, drunkenness, disorderly conduct, disturbing the peace, and other matters.

CONTENTIONS

We need consider only two of appellant's contentions: (1) that the trial court erred in failing to direct a verdict for appellant, and (2) that the trial court erred in not submitting to the jury the question of whether the officers had unlawfully entered the appellant's residence.

The following interrogatories were submitted to the jury and answered adversely to appellant's claims.

> "(1) Did Ronald Cipe commit a breach of the peace in the presence of Officers Hines [sic] and Dempsey?
>
> Yes
>
> (Yes or No)
>
> (2) Did Officers Hines [sic] and Dempsey use excessive force in making the arrest and/or transferring Ronald Cipe to the police station?
>
> No
>
> (Yes or No)

The undisputed evidence is that the officers used no force in entering the home. They knocked on the door, the door was opened and they peaceably stepped inside. In these circumstances, the entry was lawful. *United States v. Scharf*, 421 F.2d 1239 (9th Cir. 1970); *Reyes v. United States*, 417 F.2d 916 (9th Cir. 1969); *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965); *Dickey v. United States*, 332 F.2d 773 (9th Cir. 1964).

Johnson v. United States, 333 U.S. 10 (1948), upon which appellant relies, is not in point. In *Johnson*, the entry to the defendant's living quarters, which was the beginning of a search, was demanded by the officers under color of office. Here, the officers knocked on the door in

the customary manner and the door was opened. The officers made no demand, nor did they then use any force. They simply stepped inside the house through the open door and encountered no resistance whatsoever. After their entry, the appellant committed a breach of the peace in the officers' presence. *Johnson* recognizes the validity of an arrest under such circumstances. *Johnson, supra*, p. 15.

The overwhelming weight of the evidence supports the jury's findings that appellant committed a breach of the peace in the presence of the officers and that the officers did not use excessive force in making the arrest or in transferring him to the police station. Appellant was not entitled to a directed verdict, nor was he entitled to have submitted to the jury his contentions that the officers had unlawfully entered his residence.

In the light of the foregoing, we need not reach the appellant's contention on punitive damages.

The judgment of the lower court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

RONALD D. CIPE, by his Guardian, GEORGE F. CIPE,

Appellant,

v.

JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife; VICTOR HEINS and JANE DOE HEINS, his wife; FRANK C. RAMON and JANE DOE RAMON, his wife,

Appellees.

No. 26,022

Appeal from the United States District Court
Western District of Washington

ORDER

Before: HAMLEY, KILKENNY and GOODWIN*, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*The Honorable Alfred T. Goodwin, District Judge for the District of Oregon at time of argument, then sitting by designation.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

GEORGE F. GIPE, as guardian for RONALD D. GIPE, etc.,

Plaintiff,

v.

JOHN E. DEMPSEY and JANE DOE DEMPSEY, his wife, VICTOR HEINS and JANE DOE HEINS, his wife, FRANK C. RAMON and JANE DOE RAMON, his wife,

Defendants.

No. 7129

TRANSCRIPT OF PROCEEDINGS beginning on Monday, November 24, 1969 at the hour of 9:30 o'clock a.m., in Seattle, Washington, before the Honorable WILLIAM N. GOODWIN, a United States District Judge.

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Now let's talk about police department policies, and put this in the record. In this judge's opinion, a police department policy whereby the officers, instead of getting the complaining witness to go down in the middle of the night, and get some magistrate out of bed and make a complaint and sign a complaint and have a warrant issued to go out and arrest somebody who according to this complaint has done what this complainant said he was doing, Mr. Gipe standing out on the porch shouting obscenities; I say the police department policy that says the officers should walk up and knock on the door and say quiet down, is a much better policy than to take the man down and get the magistrate out of bed and issue the warrant. Now that is this judge's opinion.